IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 9, 2006 Session

IN RE: ESTATE OF LOWELL FRAZIER

Appeal from the Chancery Court for Campbell County
No. P-1847 Billy Joe White, Chancellor

No. E2005-02077-COA-R3-CV - FILED APRIL 28, 2006

In this appeal involving the Estate of Lowell Frazier, the issues presented are: (1) whether the trial court erred in awarding a guardian *ad litem* fee in the amount of $82,925 and assessing one-half of that fee against the prevailing party, Glenda Faye Smith and Mr. Frazier's estate; (2) whether the trial court erred in failing to sanction Attorney Johnny V. Dunaway for alleged violations of Tenn. R. Civ. P. 6 and 11; and (3) whether the trial court erred in failing to dismiss the will contest action filed by Gail Peine, the niece of the decedent, on *res judicata* grounds. We hold that under the equities and circumstances of this case, the trial court abused its discretion in its award of the guardian *ad litem* fee, and remand for consideration of an appropriate fee. We dismiss the appeal as to the issue of whether the court erred in refusing to dismiss the will contest action, because it is not a final judgment and not appealable as of right. We affirm the judgment of the trial court in all other respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part and Vacated in Part; Case Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL PICKENS FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Dudley W. Taylor, Knoxville, Tennessee, for the Appellant, Glenda Faye Smith.

Johnny V. Dunaway, LaFollette, Tennessee, for the Appellees, Sam and Debbie Lough, as parents of Matthew Lough; Darryl and Elizabeth Herron, as parents of Chelsea Herron; Matthew Lough and Chelsea Herron, by and through their guardian *ad litem*; and Gail Peine.

OPINION

I. Background

This is the second time this case has reached this court on appeal. The issues presented in the first appeal are intertwined with those presented this time. In the first appeal, this court stated the following, which remains useful as introductory background for the present appeal:

> This appeal concerns two separate suits filed in the Chancery Court for Campbell County in connection with the administration of the Estate of Lowell Frazier. The first suit was brought by Sam Lough, individually, and also, along with his wife, Debbie Lough, as parents and guardians of Matthew Lough, and Darryl Herron and Elizabeth Herron, as parents and guardians of Chelsea Herron. It sought to establish a lost or [spoliated] will of Mr. Frazier, which was dated January 30, 1998 ("the first will"). The second suit was brought by Matthew Lough and Chelsea Herron by and through their *guardian ad litem* [Attorney Johnny V. Dunaway], appointed in the first case, contesting a later will dated May 24, 2000 ("the second will"). The cases were consolidated below and the suit seeking to establish the first will was tried first. Under an agreement of the parties, the first case must be decided in favor of the minors before they would have standing to contest the second will. After a plenary trial a jury found as to the first case that the Plaintiffs proved by clear and convincing evidence that Lowell Frazier did not destroy the first will. Thereupon, the second trial was had before the same jury, which found against the second will on the ground that due execution was not proved and that Glenda Faye Smith, who was the sole beneficiary of the second will, and at the time it was executed was attorney-in-fact for Mr. Frazier, did not overcome the presumption of undue influence over Mr. Frazier by clear and convincing evidence. . .We find that the Court was in error in not directing a verdict in her favor in the lost will case and reverse the judgment rendered therein. This results in the Plaintiffs not having standing to pursue the second case, which is reversed and dismissed.

In re Estate of Frazier, No. E2002-01203-COA-R3-CV, 2003 WL 22046165 at *1, 2003 Tenn. App. LEXIS 598 (Tenn. Ct. App. E.S., Aug. 27, 2003)("*Frazier* I").

In *Frazier* I, the court concluded that the plaintiffs in the lost will case, the Loughs and the Herrons, did not present proof sufficient to rebut the presumption that Mr. Frazier had destroyed his first will, and therefore reversed the jury verdict and dismissed the case. *Id.* at *6-7. Consequently,

the *Frazier* I court held that the minor plaintiffs, Matthew Lough and Chelsea Herron, did not have standing to contest Mr. Frazier's second will, of which Glenda Faye Smith was the sole beneficiary. *Id.* Although the Supreme Court initially granted permission to appeal *Frazier* I, after considering the record, briefs and oral argument, the Court concluded the appeal was "improvidently granted" and dismissed the appeal. *In re Estate of Frazier*, No. E2002-01203-SC-R11-CV, 2004 Tenn. LEXIS 827 (Tenn. Sept. 13, 2004).

After the mandate in *Frazier* I had issued, and upon remand, Attorney Johnny V. Dunaway, who had been appointed guardian *ad litem* and had brought the unsuccessful will contest action on behalf of the minor plaintiffs, moved the trial court for a guardian *ad litem* fee in the amount of $82,925.[1] When it became apparent to Ms. Smith that Attorney Dunaway was requesting the trial court to assess his fee against her as a discretionary cost, she vehemently opposed the motion. Also after remand, Ms. Smith filed, on three separate occasions, a motion for sanctions against Attorney Dunaway, alleging violations of Tenn. R. Civ. P. 6 and 11. The trial court dismissed the motions for sanctions, stating simply that it found them "to be without merit." The trial court entered an order granting Attorney Dunaway a guardian *ad litem* fee in amount of $82,925, and ruling that "the Judgment for payment of the attorney fees is assessed one-half or $41,462.50 against Sam Lough and Libby Herron and one-half or $41,462.50 against Glenda Faye Smith and the Estate of Lowell Frazier."

On February 9, 2005, Attorney Dunaway filed a complaint on behalf of Gail Peine, Mr. Frazier's niece, to contest the will of Mr. Frazier dated May 24, 2002, which had been admitted to probate in common form on December 6, 2004. In response, Ms. Smith filed a motion to dismiss the will contest action, alleging that "this matter has been previously adjudicated through proceedings in the trial court, Tennessee Court of Appeals and Tennessee Supreme Court." The trial court denied Ms. Smith's motion to dismiss Ms. Peine's complaint to contest the will. After Ms. Smith filed her notice of appeal, the trial court entered an order holding that the will contest filed by Ms. Peine "is a new action" and directing the Campbell County Chancery Court Clerk to assign a new and separate docket number to Ms. Peine's will contest action. The trial court granted Ms. Smith permission to seek an interlocutory appeal of this order, and this court denied interlocutory review.

II. Issues Presented

Ms. Smith appeals, raising the following issues, as restated:

(1) Whether the trial court erred in failing to dismiss the will contest action filed by Ms. Peine.

[1] In its judgment in *Frazier* I, prior to the first appeal, the trial court had approved Mr. Dunaway's request for a guardian *ad litem* fee in this amount, so this motion was stated to be a "renewal" of his motion for fee.

(2) Whether the trial court erred in awarding a guardian *ad litem* fee in the amount of $82,925 and assessing one-half of that fee against the prevailing party, Ms. Smith, and against the estate of Lowell Frazier.

(3) Whether the trial court erred in failing to sanction Attorney Dunaway for the alleged violations of Tenn. R. Civ. P. 6 and 11.

III. Denial of Motion to Dismiss

We note initially that, generally speaking, only final judgments are appealable as a matter of right. Tenn. R. App. P. 3(a); *In re Estate of Henderson*, 121 S.W.3d 643, 645 (Tenn. 2003). A final judgment is one that resolves all the issues in a case, leaving nothing else for the further judgment of the court. *Henderson,* 121 S.W.3d at 645; *Richardson v. Tennessee Bd. of Dentistry*, 913 S.W.2d 446, 460 (Tenn. 1995). "[T]he denial of a motion to dismiss does not end a lawsuit or constitute a final judgment." *Richardson*, 913 S.W.2d at 460. Thus, the issue of whether the trial court erred in denying Ms. Smith's motion to dismiss Ms. Peine's will contest action is not appealable as of right under Tenn. R. App. P. 3(a), and we therefore dismiss the appeal as to this issue.

IV. Guardian Ad Litem Fee as Discretionary Cost

Regarding the trial court's decision to award the guardian *ad litem* fee as a discretionary cost, Tenn. R. Civ. P. 54.04 includes such a fee as "allowable only in the court's discretion." Our Supreme Court has stated as follows regarding the standard of review of such a decision:

> As is indicated by the language of the Rule [54.04], "[t]rial courts are afforded a great deal of discretion when considering whether to award costs," *see, e.g., Mix v. Miller*, 27 S.W.3d 508, 516 (Tenn.Ct.App.1999), and "the trial judge may apportion the costs between the litigants as, in [his or her] opinion, the equities demand," *Perdue v. Green Branch Mining Co.*, 837 S.W.2d 56, 60 (Tenn.1992) (citing Tenn.Code Ann. § 20-12-119 (1980)). Consequently, "appellate courts are generally disinclined to interfere with a trial court's decision in assessing costs unless there is a clear abuse of discretion." *Id.* An abuse of discretion occurs when the court either applies an incorrect legal standard or reaches a clearly unreasonable decision, thereby causing an injustice to the aggrieved party. *See Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn.2001) (citing *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn.1999)).

Woodlawn Memorial Park, Inc. v. Keith, 70 S.W.3d 691, 697-98 (Tenn. 2002).

Ms. Smith argues on appeal that "the trial court erred in awarding attorney fees, disguised as guardian *ad litem* fees, against the prevailing party." In support of her argument, Ms. Smith references the principle known as the American Rule, firmly established in this state, which provides that "litigants must pay their own attorney's fees unless there is a statute or contractual provision providing otherwise." *Taylor v. Fezell*, 158 S.W.3d 352, 359 (Tenn. 2005). Ms. Smith also cites Tenn. R. Civ. P. 54.04(1), which states that "[c]osts. . .shall be allowed *to the prevailing party* unless the court otherwise directs. . ." [Emphasis added]. Ms. Smith takes the position that the trial court "applied an incorrect legal standard" in awarding *ad litem* fees against her as the prevailing party, and that a court may never award *ad litem* fees against a party who prevails in the underlying litigation. We do not agree with this position. We do, however, agree with Ms. Smith that the trial court should not have awarded guardian *ad litem* fees against her under the particular circumstances of this case.

Rule 54.04 clearly authorizes a court to award a reasonable *ad litem* fee as a discretionary cost, stating as follows in relevant part:

> (1) Costs included in the bill of costs prepared by the clerk shall be allowed to the prevailing party unless the court otherwise directs, but costs against the state, its officers, or its agencies shall be imposed only to the extent permitted by law.
>
> (2) Costs not included in the bill of costs prepared by the clerk are allowable only in the court's discretion. *Discretionary costs allowable are*: reasonable and necessary court reporter expenses for depositions or trials, reasonable and necessary expert witness fees for depositions (or stipulated reports) and for trials, reasonable and necessary interpreter fees for depositions or trials, and *guardian ad litem fees*; travel expenses are not allowable discretionary costs.

[Emphasis added]; *see also Lock v. National Union Fire Ins. Co.*, 809 S.W.2d 483, 489-90 (Tenn. 1991). Further, Tenn. R. Civ. P. 17.03 provides that "[t]he court may in its discretion allow the guardian ad litem a reasonable fee for services, to be taxed as costs."

A review of the caselaw interpreting Tenn. R. Civ. P. 54.04 and examining awards of discretionary costs reveals that while the general rule is that such costs may be awarded only to the prevailing party, Tennessee courts have, in an apparent exception to the general rule, awarded guardian *ad litem* fees, or a portion of them, against a prevailing party.

Clearly, it is a well-established principle in our jurisprudence that courts should generally only award discretionary costs to a party that has prevailed in the underlying litigation. The Supreme Court pointed to this general principle in 1919 when it stated, "We are of the opinion that the chancellor erred in taxing [defendant] J.H.W. Steele Company with any part of the costs of the cause, for the reason that from the record disclosures it could not be held liable for anything. It

follows, therefore, as a matter of course, that it should not have been burdened with costs." *Ellett v. Embury & Maury,* 217 S.W. 818, 821 (Tenn. 1919). More recently, the Court has stated that "[p]ursuant to Tenn.R.Civ.P. 54.04(2), costs are allowable to the prevailing party, in the trial court's discretion, against the losing party or parties." *Hollingsworth v. S & W Pallet Co.,* 74 S.W.3d 347, 358 (Tenn. 2002).

In *Perdue v. Green Branch Mining Co., Inc.,* 837 S.W.2d 56 (Tenn. 1992), the Supreme Court was presented with the question of whether the trial court erred in assessing a guardian *ad litem* fee against the workers' compensation death benefit award to the decedent's children, rather than against the defendant. The Court, in reversing the trial court's decision, applied a "prevailing party" analysis, stating:

> Accordingly, it is clear that guardian *ad litem* fees can be taxed as discretionary costs under Tenn.R.Civ.P. 54.04. The only issue remaining is whether the guardian *ad litem*'s fee should be assessed as discretionary costs in this case. We conclude that it would be equitable to assess the guardian *ad litem*'s fee as costs against the defendant. We have upheld commutation of 60 percent of the award, which will be used to build a house for the benefit of the plaintiff and her children. Accordingly, we find the family to be a "prevailing party" within the meaning of Tenn.R.Civ.P. 54.04, and assess the guardian *ad litem*'s fee as discretionary costs against the defendant.

Perdue, 837 S.W.2d at 61.

Our courts have stated and applied the general rule that a party must show, among other things, that it is the prevailing party in order to be awarded discretionary costs, on a number of occasions. *Waggoner Motors, Inc. v. Waverly Church of Christ,* 159 S.W.3d 42, 65 (Tenn. Ct. App. 2004)("A party seeking discretionary costs can carry its burden by filing a timely, properly supported motion demonstrating (1) that it is the prevailing party. . ."); *Massachusetts Mut. Life Ins. Co. v. Jefferson,* 104 S.W.3d 13, 33 (Tenn. Ct. App. 2002); *Russell v. Brown,* No. E2004-01855-COA-R3-CV, 2005 WL 1991609 at *11 (Tenn. Ct. App. E.S., Aug. 18, 2005); *Sanders v. Gray,* 989 S.W.2d 343, 345 (Tenn. Ct. App. 1998); *McCoy v. McCoy,* No. 03A01-9604-CH-00143, 1996 WL 599703 at *7 (Tenn. Ct. App. E.S., Oct. 21, 1996)(upholding "the trial court's assessment of all costs, including the guardian ad litem fees, against Father [the non-prevailing party]").

Additionally, this court has on at least two occasions vacated or reversed an award of discretionary costs where the recipient was no longer the prevailing party on appeal. *Addaman v. Lanford,* 46 S.W.3d 199, 205 (Tenn. Ct. App. 2000); *Rawlings v. John Hancock Mut. Life Ins. Co.,* 78 S.W.3d 291, 302 (Tenn. Ct. App. 2001).

However, when faced with the issue of assessing the fee of a guardian *ad litem* as a discretionary cost, Tennessee courts have on a number of occasions approved the awarding of a fee against the winner of the litigation, or split the fee between prevailing and non-prevailing parties, when the particular circumstances and equities of the case demand such a result. The seminal case in this area is *Runions v. Runions*, 207 S.W.2d 1016 (Tenn. 1948), where the Court was asked to determine the ownership interests in a parcel of real estate previously owned by the decedent, Mr. Runions. The parties were Mr. Runions' widow (plaintiff), and his seven-year-old son by a previous wife (defendant). The Court found in favor of the widow, but assessed the guardian *ad litem* fees against her, stating:

> The question of adjudging costs is a matter within the reasonable discretion of the Court. This proceeding was had for the benefit of these appellants. They should pay all costs in all Courts. The appointment of a guardian ad litem to represent the infant was necessary in order that appellants' ownership of this land might be determined. There is no one other than these appellants, for whose benefit these proceedings were had, to pay this guardian ad litem fee for services of which they received the benefit. It is ordered that this fee be treated as a part of the costs adjudged against the appellants and the cause is remanded for the ascertaining by proper proceedings as to the amount of this compensation.

Runions, 207 S.W.2d at 1019.

Since *Runions*, the courts in several cases have reached a similar result when the equities required it. *See Harris v. Bittokofer*, 562 S.W.2d 815, 817-18 (Tenn. 1978); *Dockery v. Dockery*, 559 S.W.2d 952, 956 (Tenn. Ct. App. 1977); *Webb v. Webb*, 675 S.W.2d 176, 177 (Tenn. Ct. App. 1984); *Berger v. O'Brien*, No. W1999-00861-COA-R3-CV, 2001 WL 792642 at *4 (Tenn. Ct. App. W.S., July 11, 2001); *Brown v. Brown*, No. 02A01-9709-CV-00228, 1998 WL 760935 at *10 (Tenn. Ct. App. W.S., Nov. 2, 1998); *Townshend v. Bingham*, No. 02A01-9801-CV-00019, 1999 WL 188290 at *7 (Tenn. Ct. App. W.S., Apr. 6, 1999); *Woolsey v. McPherson*, No. 02A01-9706-JV-00125, 1998 WL 760950 at *5 (Tenn. Ct. App. W.S., Nov. 2, 1998).

In each of these cases, however, the courts have found particular reasons why equity upheld a departure from the general practice of awarding discretionary costs to a prevailing party. In *Runions*, for instance, the Court pointed out that the "sole defendant" was a seven-year-old boy, and that there was no one else but the plaintiffs to pay for the fee of the guardian *ad litem*, who the Court found had provided a valuable service. *Runions*, 207 S.W.2d at 1019. The *Dockery* court, reversing the judgment of the trial court assessing *ad litem* fees against a defendant doctor in an early right-to-die declaratory judgment case, noted that the defendant was certainly "bound by his Hippocratic oath and possibly his individual sense of morality to continue his attempt to maintain Mrs. Dockery's life

by the medical means at his disposal," and found it unfair for him to be charged the discretionary costs. *Dockery*, 559 S.W.2d at 956. In several of the above-cited cases, the issue presented involved a potential change of custody from one parent to the other, and the court found, among other things, that the guardian *ad litem* had provided a valuable service for the minor child. *Brown*, 1998 WL 760935 at *10 (noting that the non-prevailing father's modification petition "was prompted at least in part by legitimate concerns for [the child's] welfare"); *Townshend*, 1999 WL 188290 at *7; *Woolsey*, 1998 WL 760950 at *5. The *Woolsey* court stated that "the relative wealth of the parties. . .is one factor to be considered," and upheld the *ad litem* fee award against the prevailing party because, among other reasons, his "resources are far more extensive than those of [the mother]." *Id.*

In this case, we do not believe the equitable factors are present as in the cases cited and discussed above. This appeal presents the unusual posture of a guardian *ad litem* having brought a separate and individual will contest action on behalf of minor children, as plaintiffs, and acting as their attorney, when an earlier and similar (albeit not identical) action had been brought on the children's behalf by their respective parents, as their legal guardians. The actions, one to establish a lost or spoliated will and the other, the will contest brought by the guardian *ad litem*, both arose from the administration of Lowell Frazier's estate and were consolidated at the trial level. *Frazier* I, 2003 WL 22046165 at *1. As noted, the *Frazier* I court dismissed the will contest due to lack of standing on the part of the minor plaintiffs. *Id.*

While we do not hold it was an abuse of discretion for the trial court to have appointed a guardian *ad litem*, *see Anderson v. Memphis Housing Authority*, 534 S.W.2d 125, 129 (Tenn. Ct. App. 1975) and *Gann v. Burton*, 511 S.W.2d 244, 247 (Tenn. 1974), it is not apparent that such an appointment was necessary in the present case. The parents of both minor children were actively involved in the litigation of this case, on behalf of their wards; in fact, Darryl and Elizabeth Herron brought their action solely on behalf of their daughter Chelsea as her parents and guardians.

In filing a complaint and bringing a separate action on behalf of the children, the guardian *ad litem* stepped outside the traditional bounds of the role afforded to guardians *ad litem.* In *Keisling v. Keisling*, the court stated the following regarding the role of a guardian *ad litem*, as contrasted with an attorney *ad litem:*

> The role of the guardian *ad litem*, whether attorney or non-attorney, should be the same---to protect the child's interest and to gather and present facts for the court's consideration. The role of the attorney *ad litem*, however, should be that of any other attorney---to represent and advocate the child's interests before the court, including the calling and cross-examining of witnesses, etc. The guardian *ad litem* may testify, the attorney *ad litem* should not. The guardian *ad litem* is guided by the child's best interest, irrespective of the child's wishes;

> the attorney *ad litem* should advocate the wishes of the client, assuming the child is sufficiently mature to make such a decision. Unfortunately, Tennessee does not have a statute that clarifies the different roles of the guardian *ad litem* and the attorney *ad litem*. Consequently, the roles have been blurred, especially when an attorney is appointed as a guardian *ad litem.*

Keisling v. Keisling, No. M2003-02483-COA-R3-CV, 2005 WL 3193695 at *23 (Tenn. Ct. App. W.S., Nov. 29, 2005), quoting *Richards on Tennessee Family Law* § 8-7, at 232 (2nd ed. 2004); *accord Toms v. Toms*, No. W2003-01259-COA-R3-CV, 2005 WL 2454069 at *4-5 (Tenn. Ct. App. W.S., Oct. 4, 2005)("A guardian ad litem is not an attorney for the child, but an officer appointed by the court to assist in properly protecting the child's interests").

The *Keisling* court continued its analysis with the following pertinent comments:

> As in this case, the purpose for which a guardian ad litem is appointed must frequently be vague in order to afford the guardian ad litem the leeway to investigate and determine where the best interest of the children lie. It is often a difficult and delicate task, and the person appointed is frequently someone in whom the trial judge has some confidence. Doing the job well can sometimes unavoidably entail work that turns out to be unnecessary or duplicative of work done by the parties' attorneys.
>
> By the same token, however, the breadth of the discretion afforded a guardian ad litem to determine the duties which are necessary has the potential to lead to abuse of that discretion, as where the guardian ad litem undertakes tasks or assumes a role that is overly-expansive, not useful, or otherwise inappropriate. Therefore, the court must exercise supervisory authority over even the guardian ad litem, and the parties should not be required to pay the guardian's fees for work that was inappropriate or not useful. This should not, however, be judged with the benefit of hindsight, but rather from the perspective of a guardian who may not be able to determine what tasks are necessary until he has undertaken substantial investigation.

Keisling, 2005 WL 3193695 at *24 (footnote omitted).

The language of Tenn. R. Civ. P. 17.03 further supports the view that the actions taken by the guardian *ad litem* in this case in acting as the childrens' attorney were overly expansive. That rule states as follows:

> Whenever an infant or incompetent person has a representative, such as a general guardian, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative, or if justice requires, he or she may sue by next friend. The Court shall at any time *after the filing of the complaint* appoint a guardian ad litem *to defend* an action for an infant or incompetent person *who does not have a duly appointed representative*, or whenever justice requires. The court may in its discretion allow the guardian ad litem a reasonable fee for services, to be taxed as costs.

[Emphasis added]. The Supreme Court has recognized that the phrase in the rule "whenever justice requires" places within the trial court's sound discretion the question of appointment of a guardian *ad litem*. *Gann v. Burton*, 511 S.W.2d 244, 246 (Tenn. 1974). However, the plain language of Rule 17.03 anticipates that the customary and usual circumstance where the appointment of a guardian *ad litem* is appropriate under the rule is when an infant or incompetent person "does not have a duly appointed representative," and the guardian *ad litem* is appointed "to defend" an action "after the filing of the complaint." In the present case, the guardian *ad litem* filed the complaint himself and *prosecuted* the action on the minor plaintiffs' behalf. Moreover, the minors' parents were alive, available, and actively involved in taking legal action on behalf of their children, with the aid of their own legal counsel.

Under the foregoing analysis, we hold that the equities and particular circumstances of this case do not support an award of guardian *ad litem* fees, as discretionary costs, against the prevailing party, Ms. Smith, and against the estate. An application of the exception to both the American Rule and the Tenn. R. Civ. P. 54.04 principle that discretionary costs are generally not awarded against the prevailing party is not warranted in this case. While the zeal of the guardian *ad litem* in representing the interests of the minor children, and his thoroughness in his representation of them, is impressive, for the aforementioned reasons, we believe it was error for the trial court to have required Ms. Smith and the estate to pay for them.

Both Tenn. R. Civ. P. 17.03 and 54.04 require that a guardian *ad litem* fee, to be properly approved by the court, be reasonable. *Perdue v. Green Branch Mining Co., Inc.*, 837 S.W.2d 56, 60-61 (Tenn. 1992); *Waggoner Motors, Inc. v. Waverly Church of Christ*, 159 S.W.3d 42, 65 (Tenn. Ct. App. 2004). In this case, Attorney Dunaway filed an affidavit in support of his motion for *ad litem* fees, listing the legal services performed from the date of appointment through the entry of judgment. According to his affidavit, he spent a total of 265.5 hours on the case. The fee for these services approved by the trial court, $82,925, thus amounts to an approximate rate of $312 per hour.

In *Keisling*, the western section of this court, noting that "in Tennessee caselaw, the reasonableness of guardian ad litem fees has rarely been in dispute," stated as follows:

> In Tennessee, to determine whether requested attorney's fees are reasonable, a trial court normally considers the factors enumerated in ***Connors v. Connors,*** 594 S.W.2d 672, 677 (Tenn.1980), and in Tennessee Supreme Court Rule 8, Rule of Professional Conduct ("RPC") 1.5. The factors set out in ***Connors*** include: the time devoted to performing the legal service; the time limitations imposed by the circumstances; the novelty and difficulty of the questions involved; the skill requisite to perform the legal service properly; the fee customarily charged in the locality for similar services; the amount involved and the results obtained; and the experience, reputation, and ability of the lawyer performing the legal service. ***Connors,*** 594 S.W.2d at 676. Supreme Court Rule 1.5 lists similar, but not identical, criteria:
>
> (a) A lawyer's fee and charges for expenses shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) The fee customarily charged in the locality for similar legal services;
> (4) The amount involved and the results obtained;
> (5) The time limitations imposed by the client or by the circumstances;
> (6) The nature and length of the professional relationship with the client;
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services;
> (8) Whether the fee is fixed or contingent;
> (9) Prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
> (10) Whether the fee agreement is in writing.

Keisling, 2005 WL 3193695 at *24.

In *Harris v. Bittikofer*, the Supreme Court noted an additional factor to be considered in awarding *ad litem* fees:

> One of the principles that must predominate when a court is called upon to adjudicate compensation for legal services rendered by solicitors and guardians ad litem is that the fee must not be out of proportion to the value of the property involved in the litigation. It is

> intolerable to allow the property that is the subject of litigation to be devoured by attorney's fees.

Harris, 562 S.W.2d at 818. The *Harris* Court found that "the fee awarded was excessive" and remanded for determination of an appropriate fee. *Id.; See also Perdue*, 837 S.W.2d at 61 (remanding "for an examination of the reasonableness of the attorneys' fee awarded to plaintiff's attorneys"). Under the circumstances of this case, we do not find that a guardian *ad litem* fee of $82,925, at an hourly rate of $312, was reasonable, and we remand for consideration of a reasonable fee in light of the factors enumerated in *Keisling* and this opinion.

V. Sanctions

Ms. Smith appeals the trial court's dismissal of her motions for sanctions against Attorney Dunaway pursuant to Tenn. R. Civ. P. 6 and 11.[2] This court reviews the trial court's decision whether to impose sanctions under an abuse of discretion standard. *Andrews v. Bible*, 812 S.W.2d 284 (Tenn. 1991); *Stigall v. Lyle*, 119 S.W.3d 701, 706 (Tenn. Ct. App. 2003). The trial court's decision regarding sanctions is "entitled to great weight on appeal." *Stigall*, 119 S.W.3d at 706; *Krug v. Krug*, 838 S.W.2d 197, 205 (Tenn. Ct. App. 1992).

Ms. Smith's first motion alleged that Attorney Dunaway violated Tenn. R. Civ. P. 11 in filing his motion for guardian *ad litem* fees. Rule 11 requires that the claims, defenses, and other legal contentions contained in a document presented to the court be "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." In her motion, Ms. Smith argues that "[t]here is no statutory authority, case precedent or any other authority which could reasonably be deemed to allow recovery of attorney fees by a losing party against a prevailing party." As is seen from the discussion in Section IV above, this contention is without merit.

Ms. Smith's third motion for sanctions stated in relevant part as follows:

> When this case was called for hearing of the motions on March 28, 2005, the Court inquired as to what motions were to be heard. Attorney Dunaway informed the Court that in addition to motions previously scheduled to be heard, he had a motion for default judgment.
>
> Undersigned counsel for [Ms. Smith] advised that he had not been served with any such motion. Attorney Dunaway asserted in the

[2] Ms. Smith filed a total of three motions for sanctions, each of which was denied by the trial court. In her brief, she states that she "elects to abandon any appeal as to the second motion for sanctions," so we address the issues raised by her first and third motions for sanctions.

presence of the Court that it had been served at the time his prior motions were served. The prior motions to which reference Attorney Dunaway made were filed with the Court on February 9, 2005.

After a short further discussion, the Court, with special Judge William H. Inman presiding in lieu of Chancellor White, concluded that he should not hear any of the motions. Upon the return of undersigned counsel to his office, he found the motion for default judgment which was in the mail received on March 28, 2005.

* * *

Although the date of March 16, 2005, is both affixed to the letter and to the Certificate of Service, the motion and letter were not mailed to undersigned counsel until March 23, 2005.

* * *

Counsel for [Ms. Smith] thereafter inquired of the office of the Clerk and Master as to when this motion was filed with the Court. Counsel was informed that the filing date was March 22, 2005.

Rule 6.04, Tenn. R. Civ. P., provides that a "written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five (5) days before the time specified for the hearing" subject to exceptions not here applicable. Rule 6.01 provides that where the period of time prescribed or allowed is less than 11 days, "intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation." Rule 6.05 provides that three days shall be added to the specified time where service is by mail.

As noted above and by the attached exhibit, the motion and notice of hearing were not placed in the mail for service on Defendant until March 23, 2005...Accordingly, one countable (business) day had elapsed from the time of placing the motion and notice of hearing in the mail to effect service and the date Attorney Dunaway attempted to have this motion heard. The earliest date for the hearing of the motion permitted by the Rules would have been April 5, 2005.

As noted above, Attorney Dunaway represented to counsel and more importantly, to the Court, that he had served the default motion with his other motions filed on February 9, 2005...Accordingly, Attorney Dunaway clearly made a false representation to counsel and to the Court as the default motion was not filed until March 22, 2005.

> Attorney Dunaway also completed two false Certificates of Service. Both the motion and the notice of hearing bear a Certificate of Service signed by Attorney Dunaway representing that "a true and accurate copy of the above document has been mailed all parties in interest" on March 16, 2005.
>
> * * *
>
> Attorney Dunaway has subsequently filed an additional false Certificate of Service. This was provided in connection with the response (the "Response") of Attorney Dunaway to Defendant's original Motion for Sanctions under Rule 11. This Response was received by Defendant's counsel on March 30, 2005.
>
> The service copy of the Response was sent to Defendant's counsel as an enclosure to a cover letter directed to the Clerk and Master. The letter and the Response were both dated March 23, 2005. The Certificate of Service contained a representation that the service copy was mailed on March 23, 2005.
>
> The service copy was in fact mailed to Defendant's counsel on March 28, 2005...Attorney Dunaway therefore continues to provide false certificates of service.
>
> Attorney Dunaway has been repeatedly guilty of outrageous conduct. His conduct exhibits actual contempt for the rules of conduct by which attorneys are to govern themselves and further, actual contempt for this Court.
>
> In light of the clear fabrications of Attorney Dunaway as demonstrated above and the previous filings, the Court is respectfully requested to remove Attorney Dunaway from any further representation in this cause and to bar him from any further proceedings. Defendant further respectfully requests that the Court award her additional judgment against Attorney Dunaway in an amount equal to her expenses, including reasonable attorney fees incurred in connection in dealing with the misrepresentations of Attorney Dunaway.

[Numbering in original omitted].

Attorney Dunaway's response to this motion was to the effect that any clerical mistakes made in reference to dates, or any delays in placing motions in the mail, were inadvertent, not purposeful; that Ms. Smith did not demonstrate any injury or prejudice due to the alleged lack of proper notice of hearings; and that the allegations in the motion involved matters that were not properly

sanctionable, but were in fact matters that attorneys acting in an adult fashion routinely agreed to work out and resolve between themselves. The trial court dismissed the motions for sanctions, stating in its order that "after reviewing the record and entertaining the arguments of counsel, the Court finds the Motions to be without merit." Based on our review of the record, we do not find that the trial court's refusal to issue sanctions to be an abuse of its discretion, and we affirm the trial court's judgment in this regard.

VI. Conclusion

The judgment of the trial court awarding a guardian *ad litem* fee in the amount of $82,925 is vacated and the case remanded for the determination of a reasonable fee in a manner consistent with this opinion. The judgment of the trial court dismissing Ms. Smith's motions for sanctions is affirmed. The appeal as to the issue of whether the court erred in refusing to dismiss the will contest action is dismissed, because it is not a final judgment and not appealable as of right. Costs on appeal are assessed one-half against the Appellant, Glenda Faye Smith, and one-half against the Appellees Sam and Debbie Lough, and Darryl and Elizabeth Herron.

_____

SHARON G. LEE, JUDGE